Appellee instituted this action on November 6, 1952 in the Supreme Court of New York County pursuant to the New York Fair Trade Act (New York General Business Law Section 369-a *et seq.*). The New York Supreme Court granted the permanent injunction sought by appellee on May 8, 1953. The judgment of the New York Supreme Court was affirmed *per curiam* by the Appellate Division of the New York Supreme Court on January 5, 1954. This judgment was subsequently affirmed by the New York Court of Appeals, 307 N. Y. 229, 120 N. E. 2d 802 (1954).

Argument

In essence, appellant's position is that the decision of this Court in 1951 in *Schwegmann* v. *Calvert Distillers Corporation*, 341 U. S. 384, requires re-examination of questions which were settled in *Old Dearborn Distributing Corp.* v. *Seagram Distillers Corp.*, 299 U. S. 183. There is no basis for this contention and we submit this Court so indicated in denying certiorari in *Schwegmann Bros.* v. *Eli Lilly & Co.*, 205 F. 2d 788 (5th Circuit 1953), cert. den. 346 U. S. 856, re-hearing denied 346 U. S. 905. While we appreciate that denial of certiorari by this Court is not to be construed as an authoritative holding, yet we submit that in denying certiorari in *Schwegmann Bros.* v. *Eli Lilly & Co.* this Court at least indicated there was no substantial federal question involved.

It was authoritatively held in *Old Dearborn* that the fair trade laws encompass no unlawful delegation to private persons of the power to fix prices in derogation of the due process clause of the Fourteenth Amendment. *Schwegmann Bros.* v. *Calvert Distillers Corp.* held merely that the Sherman Act prohibited interstate resale price maintenance so far as non-signers were concerned and that the Miller-Tydings Act was not sufficiently definitive to lift the ban of the Sherman Act against enforcement of fair trade prices insofar as non-signers were concerned.

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The *Schwegmann* decision not only did not cast doubt on the *Old Dearborn* decision, but Mr. Justice Douglas' opinion in the *Schwegmann* case indicated in at least three places that further Congressional legislation was all that was needed to permit full enforcement of the fair trade laws against non-signers even though interstate commerce was involved.[1] Under these circumstances it is a misconception of the *Schwegmann* decision to state, as does appellant, that it "casts doubt on the continued vitality of the *Old Dearborn* ruling."

The argument made by appellant that the non-signer provision of the New York Fair Trade Act delegates to private persons the power to fix prices in violation of the due process clause of the Fourteenth Amendment was specifically considered and rejected by this Court in *Old Dearborn Distributing Corp.* v. *Seagram Distillers Corp.*, 299 U. S. 183. This Court stated "we find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons" (299 U. S. at p. 194). It is significant to note that with the exception of *United States* v. *Line Material Co.*, 333 U. S. 287, which is not relevant on this issue, the same cases cited on this

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[1](1) "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." (341 U. S. at p. 386)

(2) "Had Congress desired to eliminate the consensual element from the arrangement and to permit blanketing a state with resale price fixing if only one retailer wanted it, we feel that different measures would have been adopted—either a nonsigner provision would have been included or resale price fixing would have been authorized without more." (341 U. S. at p. 390)

(3) "It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts or agreements', the inference is strong that Congress left the non-contracting group to be governed by preexisting law." (341 U. S. at p. 395)

point in the present Jurisdictional Statement were cited in the briefs in the *Old Dearborn* case and distinguished by this Court.

The Jurisdictional Statement provides no support for appellant's contention that the McGuire Act raises "novel and important constitutional questions respecting limitations on the delegation of legislative power under Article I, Section 1, the Commerce clause and the Fifth Amendment of the Constitution". In fact, the provisions of the McGuire Act and the decision of this Court demonstrate there is no substantial constitutional question regarding the McGuire Act.

There is no constitutional question regarding delegation of legislative power under Article I, Section 1 of the Constitution because an examination of the McGuire Act indicates that Congress made no delegation of any of its powers. Rather, it consented to the removal of the impediment of the Sherman Act against the operation with respect to interstate commerce of resale price maintenance statutes enacted by the various states. Such Congressional consent was in specific terms, since the McGuire Act details with particularity the provisions of the state fair trade statutes to which the Congressional consent is to apply. It does so by specifying in detail the standards and safeguards which a state fair trade act must contain in order to qualify for interstate effectiveness.[2] The limited character of the Congressional consent embodied in the McGuire Act would be demonstrated if a state fair trade statute were enacted containing provisions not within the McGuire Act. Such provisions would not be within the

[2] The standards and safeguards found in each of the more than 40 fair trade state statutes include provisions that the state act must involve only trademarked and branded goods; must require the goods to be in fair and open competition with goods produced by others; must be limited to vertical rather than horizontal fair trade contracts; and must permit enforcement against non-signers only when there has been a willful and knowing disregard of the fair trade prices.

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Congressional consent given in the McGuire Act.[3] Thus even the most cursory examination of the McGuire Act indicates that it delegates no power vested in Congress by the Constitution. We submit that no constitutional question in this respect is raised by the mere circumstance that Congress did not apply inapplicable precedents used in exempting horizontal agreements of regulated industries from the Sherman Act to the wholly different situation involved in vertical resale price maintenance.

The terms of the McGuire Act also answer the contention that there is a violation of due process under the Fifth Amendment. The McGuire Act neither creates substantive rights nor imposes obligations. The various state fair trade statutes create the rights and impose the obligations. In the McGuire Act, Congress merely consents to the enforcement of such rights and obligations created by state fair trade acts insofar as such rights and obligations might otherwise contravene the paramount authority of the Federal antitrust laws or the Commerce clause of the Constitution.

The contention that the McGuire Act raises constitutional questions under the Commerce Clause is untenable. The decisions of this Court in *Southern Pacific Rail Co.* v. *Arizona*, 325 U. S. 761, and *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, which hold that Congress has the undoubted power to redefine the distribution of power over interstate commerce and permit the states to regulate commerce in a manner which would otherwise not be permissible, completely dispose of this contention.

Finally, we submit, no support for review is offered by the fact that the *Old Dearborn* decision was rendered when only 14 states had adopted fair trade acts, while now at least 26 other states have adopted them, and on two occasions Congress has adopted legislation based upon the

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[3] Compare *Masters, Inc.* v. *Sunbeam Corp.*, 112 F. Supp. 268 (S. D. N. Y. 1952) regarding a similar problem in connection with the Miller-Tydings Act.

decision of this Court in the *Old Dearborn* case. It is submitted these facts render it all the more desirable that this Court should not disturb constitutional precedents which have been established and relied upon by the legislative and executive agencies of government for almost twenty years.

Appellee respectfully submits that the appeal should be dismissed because the constitutional questions sought to be presented are so insubstantial as not to warrant further argument.

Respectfully submitted,

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